UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: NATIONAL HOCKEY LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	)	MDL No. 14-2551 (SRN/BRT)
This Document Relates to: ALL ACTIONS	)	

BOSTON UNIVERSITY'S RESPONSE TO DEFENDANT'S OPPOSITION TO MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

Introduction

The National Hockey League's memorandum in opposition to Boston University's petition for attorneys' fees ("Opposition") does not challenge either the amount of time counsel spent opposing its motion to compel production of documents from the Chronic Traumatic Encephalopathy Center or the hourly rates requested. Instead, the League takes the remarkable position that it "***won*** its motion in part" (Doc. 869 at 12) (emphasis in original), and that fees should be denied in their entirety. This memorandum will explore the basis for that claim, and demonstrate that the governing law provides broad-based support for the University's fee petition.

The Opposition accuses the University of engaging in "revisionist history" (at p. 1). Yet the NHL's lengthy narrative of communications between counsel (at pp. 2 – 11 and in particular, pp. 5 - 6) characterizes its subpoena as seeking slides relating ONLY to

the handful of brain donors who played in the NHL.[1] The Opposition sidesteps the fact that the subpoena demanded primary data relating to every single one of the approximately 400 brains that had been donated to the CTE Center, and all the drafts, communications, and underlying raw material relating to research published by CTE scientists. The NHL's narrative also declines to acknowledge that although most communications during the winter of 2017 focused on NHL players, the larger demands of the subpoena loomed over every conversation, email, and filing with the Court. *See*, e.g., Doc. 870 – 21 (email from University counsel to NHL counsel).

The NHL's creative use of partial quotations is noteworthy. On April 13, 2017, responding to the League's request for information about other NHL players, University counsel wrote to the NHL's lawyers, "I'm not sure what more can be provided *when donors or their families forbid the release of information. . . . I'm not closing the door but I don't see how the CTE Center can get around a donor's refusal to allow third party access to information.*" Doc. 870 – 29. But the NHL's brief (Doc. 869 at 9) omits the italicized text above. This matters because courts frown on persuasion by misrepresentation.

Boston University eventually secured approvals and produced data relating to six former NHL players whose brains were analyzed by the CTE Center, along with certain other non-confidential, publicly accessible information. The University was *not* required

[1] The NHL complains that the hard drive containing data relating to Mr. Zeidel was defective Doc. 869, p. 8, n. 2. The University has remedied the problem and sent counsel for both parties a new set of hard drives.

to produce the vast array of additional information the League demanded: slides and primary data relating to every other brain that had been analyzed[2], and data and communications underlying published research.[3]

The Subpoena to Boston University Was Excessive, and the Motion to Compel Was Not Substantially Justified

The NHL interprets Federal Rule of Civil Procedure 37(a)(5)(B) to mean that a motion to compel is "substantially justified" as long as some aspect is upheld, and since the Court ordered the University to produce some information, the entire fee petition should be denied. Case law interpreting the meaning of that phrase in the context of the Federal Rules, and federal statutes[4] in which that language appears, do not support this argument.

The Eighth Circuit has held that the "substantial justification" standard requires a party to show that its position was "clearly reasonable, well founded in law and fact, solid though not necessarily correct." United States v. 1,378.65 Acres of Land, 794 F.2d 313 (8th Cir.1986). *See also* Bah v. Cangemi, 584 F. 3d 680, 683 – 84 (8th Cir. 2008) (same; citing cases). The inquiry is fact-specific, and the meaning of that term as applied to this

[2] The phrase "and other athletes" appears repeatedly in the subpoena. Doc. 870-8, ¶¶ 6 – 15.

[3] Doc. 870-8, ¶¶ 18 – 19.

[4] Many of the cases interpreting the "substantially justified" language involve the Equal Access to Justice Act, ("EAJA"), 28 U.S.C. § 2412, whose language mirrors that of Fed. R. Civ. P. 37(a)(5)(B).

case is best understood by turning to the Court's April 26, 2017 Memorandum Opinion and Order (Doc. 731) (the "Order"). Although this issue was addressed in some detail in the University's initial brief in support of its fee petition (Doc. 846, pp. 6 – 7, 9 – 15), it is worth repeating a few of the Court's conclusions:

- Referring to the underlying data sought by the NHL and the League's desire "to probe the basis of Plaintiff's allegations, which rely on the BU CTE Center's research,". . . "The court disagrees with the NHL's asserted need for the information." Doc. 731 at 18 – 19.
- The Court distinguished the discovery permitted in another, unrelated phase of this case from the material sought from Boston University and concluded, "BU's underlying data is not similarly relevant. The NHL could not have known about possible causal links between head injuries and CTE based on information in unpublished research." Id.
- The Court dismissed the purported need of the NHL's expert for underlying data by observing that he has expressed opinions in this very case in which he challenges CTE diagnoses without access to underlying data. Id. at 20.
- The Court subtly criticized NHL counsel for failing to honor a request for citations to MDL cases "in which courts ordered the production of the underlying data of the peer-reviewed articles, leading to a successful Daubert challenge." Id. at 21.
- The Court's detailed rejection of the cases the NHL did provide (Id. at 22 – 27) reflects arguments presented by the University (Doc. 726, pp. 6 – 15) and

shows that the legal foundation on which the NHL's position rests is flimsy at best. The cases distinguished by the Court certainly do not provide substantial justification for the League's argument.

- The Court concluded that "the record demonstrates a significant, overwhelming burden." Id. at 27.
- "In balancing need versus burden, the tremendous burden to non-party BU outweighs the NHL's need for the requested information. Accordingly, the Court denies the NHL's Motion to Compel in part as to most of the requested information." Id. at 28.

None of the random decisions cited in the NHL's Opposition was issued by the Eighth Circuit or a Minnesota federal court. And none of those decisions sheds light on the issue before this Court. The unique facts in each of those cases reflects legitimate disputes about which reasonable people disagreed. Here, it is difficult to discern how a reasonable person can disagree with the Court's decision to reject the vast majority of the NHL's subpoena.

The NHL's reliance on Cobell v. Norton, 226 F.R.D. 67 (D.D.C. 2005) does not advance its argument. In Cobell the court concluded that the party opposing a motion for sanctions had "squarely addressed[ed] the [relevant] law . . ." Id. at 91. Here, and notwithstanding the League's claim that it had done the same (Doc. 869 at 15), the NHL failed to honor the Court's request for citations to MDL cases supporting its position, but instead, cited cases that are clearly distinguishable (Order at 23 – 27). That does not

amount to addressing the relevant law. The fact that this Court "dedicate[ed] a paragraph to each case" (Doc. 869 at 15) is a measure of the precision of this Court's analysis and its attention to detail, not to the integrity of the NHL's argument. Indeed, and notwithstanding the NHL's dismissive response, the Court's decision "categorically rejected" the cases cited by the League. Id.

In Cobell the court observed that "a party's position is not substantially justified if there is no legal support for it . . . . or, worse, defies an unequivocally clear obligation." Cobell, 226 F.R.D. at 91 (*quoting* Boca Investment Partnership v. U.S., 1998 WL 647214, at * 2 (D.D.C. 1998). Here, this Court's analysis of the decisions cited by the League establishes that its position had no legal support, and, as noted elsewhere, the submission of those cases "defies an unequivocally clear obligation." *See* Doc. 721; Doc. 726, pp. 1, 6 – 15.[5] In Cobell the court concluded that the defendants' objections to certain discovery requests, while unsuccessful, was substantially justified because of "complicated distinctions . . . between permissible and impermissible subject matter areas for the purposes of compelling disclosure and discovery in this case." 226 F.R.D. at 91. Here, there are no such complicated distinctions: there is a bright line separating the NHL's request for material relating to former NHL players and everyone else, and there is simply no credible justification for the NHL's persistent effort to secure drafts and data underlying published research papers.

[5] The fact that the University, and the Court, were required to waste time analyzing cases that were so clearly distinguishable and irrelevant to the issues in this case both required the University to spend more time for which it should be rightly compensated, and underscores its argument that the NHL's position is not substantially justified.

"The most critical factor in the fixing of a reasonable fee is the overall success obtained." Jenkins v. Missouri, 127 F. 3d 709, 718 (8th Cir. 1997). "[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Farrar v. Hobby, 506 U.S. 103, 111-12 (1992). There can be no question that in this case, the relief not only "materially alter[ed]" the relationship between the University and the NHL by significantly limiting the amount of material the University was required to provide, but that limitation "directly benefits" the University.

Jenkins considered the problem presented in this case, and soundly rejected the NHL's theory:

> Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), gives the paradigm for determining whether fees are compensable under section 1988 in cases in which the plaintiff has prevailed on some, but not all, of his claims. If any issues on which the plaintiff lost are unrelated to those on which he won, the unrelated issues must be treated as if they were separate cases and no fees can be awarded. See id. at 434–35, 103 S.Ct. at 1939–40. *If, however, the claims on which the plaintiff lost are related to those on which he won, the court may award a reasonable fee. See id*. The most important factor in determining what is a reasonable fee is the magnitude of the plaintiff's success in the case as a whole. . . . If the plaintiff has won excellent results, he is entitled to a fully compensatory fee award, which will normally include time spent on related matters on which he did not win. See Hensley, 461 U.S. at 435, 103 S.Ct. at 1940. If the plaintiff's success is limited, he is entitled only to an amount of fees that is reasonable in relation to the results obtained. *See id.* at 440, 103 S.Ct. at 1943. Finally, of course, any fees must be "reasonably expended," so that services that were redundant, inefficient, or simply unnecessary are not compensable. . . .

Jenkins, 127 F.3d at 716 (emphasis added). The NHL's absolute failure to acknowledge the governing law in this jurisdiction is troubling at best.

NHL counsel's affidavit (doc. 870) and the thirty-one exhibits that accompany it establish that counsel for the League and the University enjoy a cordial professional relationship that has not been tainted by difficult negotiations. Beyond that, it is unclear why the League submitted them. While they may have some (very limited) historical interest, they do not add value to the analysis. They show that over time the University modified its position in some respects – a testament to NHL counsel's negotiating skills – but that the University's position regarding two of the largest units of information sought by the League never wavered. The University refused to produce primary data pertaining to brain donors who did not play in the NHL, and it refused to produce underlying data and research notes supporting articles that were published in peer-reviewed journals.

The NHL's attempt to distinguish U.S. v. Allen, 578 F. Supp. 468 (W.D. Wis. 1983) begins with the odd conclusion that that case is "BU's principal authority." Doc. 869 at 17. Allen is not factually identical to the case before this Court but its main point applies: the court refused to enforce a subpoena seeking pre-publication material from a third party with no stake in the outcome of the litigation.

The NHL correctly notes that the research at issue in Allen did not appear to be central in that case, whereas the CTE Center's research relating to chronic traumatic encephalopathy goes to the core of this one. But that is completely irrelevant because, as this Court observed during oral argument, the expansive subpoena issued to the CTE Center was a "fishing expedition." Doc. 712, Tr. 46 – 47. This remark took place in the context of a discussion about the NHL's purported need for underlying data, and a review of the transcript makes clear that the Court did not think the NHL's position was

justifiable. In fact, the Court invited the NHL to produce evidence of "lack of integrity" in CTE Center research, which it failed to do. Id. Thus the NHL's claim of "need" neither translates to "entitled" nor provides evidence that its subpoena was substantially justified.

Partial Success Is not a Bar to a Fee Award.

The NHL argues that since it "won" some aspects of the motion to compel, its entire effort was substantially justified and that as a result, no fees should be awarded. The league has not cited a single Eighth Circuit or Minnesota federal court decision to support its argument, because courts in this Circuit have taken a more nuanced view than the NHL proposes. For example, in D.C., Inc. v. State of Missouri, 627 F. 3d 698 (8th Cir. 2010), the court held that "ordinarily, attorney's fees under [42 U.S.C.] § 1988 are available to a prevailing civil rights plaintiff who "obtains *some relief* on the merits of his claim." 627 F. 3d at 700 (quoting Farrar v. Hobby, 506 U.S. 103, 109 (1982)) (emphasis added) (cited with approval by this Court in North Dakota v. Heydinger, No. 11-cv-3232 (SRN/SER), 2016 WL 5661926 (D. Minn. Sept. 29, 2016). Although this case does not raise civil rights claims, the same reasoning applies.

Kirchner v. Astrue, No. 10-3263 (PAM/LIB), 2011 WL 6122283 (D. Minn. Nov. 21, 2011), involved a fee petition by a prevailing plaintiff in a disability benefits case under the Equal Access to Justice Act, 28 U.S.C. §2412(d)((1)(A). The court observed that "[t]he fact that the government may have prevailed upon most of the issues raised by plaintiff does not mean that the government's position was 'substantially justified' if the

government's position was unreasonable as to the issue [on which it lost]." Id. at * 2 (citations omitted). The same reasoning applies here: the parties' submissions, the Court's comments from the bench, and the April 26 Order establish that "the [NHL's] position was unreasonable" as to the issues it lost.

In North Dakota v. Heydinger, supra, this Court granted fees to plaintiffs because partial summary judgment "awarded them the relief they sought in bringing the lawsuit." 2016 WL 5661926 at *2. Similarly here, the Order awarded the University the relief it sought, by narrowing the scope of the NHL's discovery demand to that which a reasonable person would agree is relevant to the contours of this lawsuit - but explicitly rejecting the League's overreaching demands. In awarding fees this Court applied the commonly-accepted "lodestar" formulation, which includes "(8) the amount involved and the results obtained. . . ." (Id. at * 15). By any measure the "results obtained" here were significant – for the University's CTE Center, and, as the Court acknowledged by referring to the record, for researchers everywhere.

* * * * *

The NHL's Opposition closes with a creative flourish, by arguing that since "the University has made no showing that the expenses it incurred are uniquely attributable to defending against the unsuccessful portion of the motion," no fees should be awarded. Doc. 869 at 17 – 18. Once again the NHL offers no support for its argument and apparently ignores the fact *this Court* has considered the identical issue. Ackerman v. PNC Bank, Nat. Ass'n, No. 12-cv-0042 (SRN/JSM), 2013 WL 3124509 (D. Minn. June 19, 2013) affirmed the Magistrate Judge's order which, among other things, granted in

part and denied in part the plaintiff's motion to compel discovery. Deficiencies in the defendant's responses prompted the plaintiff to file a second motion to compel. Id. at *1. The Court wrote:

> Defendants contend that the Magistrate Judge should have apportioned fees to be awarded on the Second Motion to Compel Discovery because it was granted in part and denied in part. However, when a court overruled many of the objections to a motion to compel, and a significant number of those objections were not substantially justified, then it may be appropriate to allow the moving party to 'recover a portion, *if not all*, of the reasonable expenses and attorneys fees' incurred bringing the motion. DIRECTV, Inc., v. Puccinelli, 224 F.R.D. 677, 692-693 (D. Kan. 2004). Here, the Magistrate Judge found in favor of Plaintiff on most of the issues raised in her Second Motion to Compel Discovery and that Defendants' positions were not substantially justified. Therefore, the Magistrate Judge had discretion to award Plaintiff her reasonable fees and costs. Id. at *4 (emphasis added by the Court).

In Frerichs v. Hartford Life and Acc. Ins. Co., No. 10-3340 (SRN/LIB), 2012 WL 3734124 (D. Minn. Aug. 28, 2012), this Court granted in part and denied in part the plaintiff's application for attorney fees and costs, and rejected an argument that the fee award should be reduced "based on the time spent seeking discovery that the Court did not allow." Id. at * 4. The Court noted that "just because Plaintiff did not succeed on his entire motion to compel does not mean that it was not a reasonable motion to pursue." Id. This case is Frerichs in reverse: the University should be awarded fees because even though its opposition to the subpoena was not entirely successful (but nearly so), it was reasonable in every respect.

The University's briefs focused on the damage to scientific research that would be imposed by forcing compliance with the burdensome subpoena. The April 26 Order acknowledges that burden. Perhaps it is possible to parse the University's submissions

and try to determine how much time was spent on issues relating solely to production of the primary data of NHL players, but it is more informative, and accurate, to view the work as a whole. By doing so the conclusion is inescapable: most of the University's legal work focused on the issue of burden, which forms the basis for the Court's decision.

This Court's Decision in Ewald v. Royal Norwegian Embassy

This Court's comprehensive analysis of attorney fee issues in Ewald v. Royal Norwegian Embassy, No. 11-2116 (SRN/SER), 2015 WL 1746375 (April 13, 2015) is particularly relevant to the University's fee petition.[6] There, the successful plaintiff voluntarily reduced her fee petition to account for her limited success in certain aspects of the case. Similarly, because the University's lawyers do not keep precise time records, it presented conservative estimates of time they spent on this case. The defendant in Ewald sought further reductions but the Court, citing Hensley v. Eckerhart, 461 U.S. 424 (1983), wrote:

> Where a plaintiff obtains partial success but her claims involve a common core of facts or are based on related legal theories, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." Hensley, 461 U.S. at 435. "Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." Id. at 435.

[6] Although the fee award was based on the applicable statutes at issue in the case, the analysis largely involves the application of familiar federal case law relating to attorneys' fees.

Ewald at *6. Similarly here, this case involves a common core of facts and related legal theories.

> Notably, the Court also looked at the "big picture" and, observed,
>
> The Minnesota Supreme Court has also noted that "success" may be measured not simply by monetary recovery, but based on the significance of the litigation, observing, "Some federal circuits measure success not only by looking at the difference between the judgment recovered and the recovery sought, but also by looking at the significance of the legal issues on which the plaintiff prevailed and the public purpose served by the litigation." Milner v. Farmer's Ins. Exch., 748 N.W.2d 608, 623 (Minn.2008) (citations omitted).

Ewald at *7. There can be no doubt that the outcome of this case serves a "public purpose." The interests at stake in the dispute about the NHL subpoena are far greater than those relating to the National Hockey League or Boston University. It is striking that the NHL failed to offer any evidence rebutting the concerns of researchers who feared that the consequences of enforcing the subpoena would adversely affect scientific research far beyond Boston University's CTE Center. *See,* e.g., Docs. 682 – 685 (Affidavits of Dr. Ann C. McKee, Dr. Robert A. Stern, Dr. Nigel J. Cairns, and Dr. Ronald C. Petersen).

Ewald categorically rejected the defendant's call for a fee reduction on grounds that the plaintiff had not prevailed on all her claims. Ewald at * 14. Similarly, here the Court should reject the NHL's attempt to carve out any portion of the University's effort as unrelated to its overall success.[7]

[7] The defendant in Ewald was represented by the same firm that represents the NHL in this case.

Conclusion

The National Hockey League's failure to challenge the time spent opposing the motion to compel, or the hourly rates requested by University attorneys, narrows the issue before this Court: was the NHL's position substantially justified? The April 26 Order provides the answer: it was not.

If the NHL's subpoena had been limited to requests for information only about NHL players, it is unlikely that a motion to compel would have been necessary. But as the Court has noted, the League overreached. This case has been time-consuming, costly, and extremely stressful to Boston University CTE Center scientists and their staff. The bottom line is that no matter how the NHL spins the outcome, it lost. Boston University was the prevailing party, and the League's legal positions were not substantially justified. For the reasons set forth in the April 26, 2017 Order, governing case law, this memorandum, Doc. 846 (the University's initial memorandum in support of a fee award), and common sense, Boston University respectfully renews its request for an award of attorneys' fees and expenses in the amount of $119,703.84.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lawrence S. Elswit, hereby certify that on June 16, 2017, this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Lawrence S. Elswit